

ISSUES

The Administrative Law Judge found claimant entitled to permanent partial general disability benefits for a twelve percent (12%) work disability. The claimant requests the Appeals Board to review that finding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, claimant is entitled to benefits based upon a thirty-three percent (33%) permanent partial general disability.

(1) The parties agree claimant sustained a back injury on November 12, 1992, while working for the respondent. The parties also agree claimant's average weekly wage is \$273.64 for purposes of this proceeding. The only issue remaining at this time is nature and extent of claimant's disability.

At time of regular hearing, claimant was forty-seven (47) years old and had obtained a twelfth-grade education. Claimant's job history includes work as a crayon labeler, deli manager, short-order cook, cashier, and assembly-line worker. Respondent hired claimant in January 1991, as a laundry assistant and cook. Later claimant was promoted to laundry supervisor, the position claimant held on the date of her accident.

After a period of conservative treatment, including physical therapy and work hardening, claimant was released to return to work with permanent restrictions and limitations. Before claimant received her final release, respondent provided accommodated employment. However, when claimant received permanent restrictions, respondent eliminated the accommodated position and offered claimant employment as a laundry assistant or cook. Respondent had previously eliminated claimant's former position as laundry supervisor. Because she felt she could not physically perform the work of a laundry aide or cook, claimant terminated her employment with respondent. Both positions offered claimant paid \$5.00 per hour compared to the \$5.60 per hour rate claimant received as laundry supervisor. No evidence was presented to gauge the loss of overtime pay claimant would sustain by accepting one of the offered positions.

Board-certified neurosurgeon Greg M. Snyder, M.D., treated claimant beginning December 12, 1992, through the summer of 1993. During the course of her treatment, Dr. Snyder ordered a CT scan and myelogram. The CT scan and myelogram indicated degenerative disc disease and disc bulging in the lower lumbar spine. Dr. Snyder assessed claimant's functional impairment at two percent (2%) and testified that she should lift no greater than thirty-five (35) pounds, refrain from repetitive lifts greater than fifteen to twenty (15-20) pounds, and avoid repetitive bending, turning, or twisting. At her attorney's request, claimant saw Wichita physician, Ernest R. Schlachter, M.D., for evaluation. Based upon his evaluation, Dr. Schlachter assessed claimant's impairment at twenty percent (20%) to the body as a whole based upon the AMA Guides, Third Edition Revised, and his many years of experience as a company physician and performing evaluations. Dr. Schlachter believes that claimant has aggravated a pre-existing condition of spinal stenosis and disc disease in the lumbar spine. He believes claimant should never lift more than twenty-five (25) pounds, refrain from repetitive lifts greater than fifteen (15) pounds, and avoid repetitive bending, twisting or working in awkward positions. Dr.

Schlachter also believes claimant should restrict her employment to jobs where she can sit part-time and stand part-time.

Both parties presented the testimony of vocational experts. Claimant presented the testimony of Mr. Jerry Hardin who has been a human resource/personnel consultant for twenty-three (23) years. Mr. Hardin believes claimant has lost her ability to perform work in the open labor market in the range of fifty-five to sixty percent (55-60%) based upon Dr. Schlachter's restrictions. Mr. Hardin did not have Dr. Snyder's restrictions because the doctor's deposition was taken after Mr. Hardin testified. Respondent's Ms. Karen Terrill, a vocational rehabilitation counselor and consultant, believes claimant has lost thirty percent (30%) of her ability to perform work in the open labor market based upon the restrictions of Dr. Schlachter and thirty-nine percent (39%) based upon the restrictions of Dr. Snyder. Based upon these opinions, the Appeals Board averages the percentages provided by the experts and finds claimant has sustained a forty-six percent (46%) loss of her ability to perform work in the open labor market as a result of the back injury she sustained while working for respondent.

Claimant has lost twenty percent (20%) of her ability to earn a comparable wage. As of the date of the regular hearing, claimant had applied for approximately twenty-five (25) jobs without success. Although Ms. Terrill believed claimant had recently obtained employment at a restaurant earning \$4.50 per hour, she felt there was no loss of ability because claimant could obtain a job in her area that would pay comparable wage. Mr. Hardin testified that he felt it was more likely than not that claimant could earn \$220.00 per week post-injury. In this instance the Appeals Board finds this opinion to be consistent with the evidence and credible, and adopts it as its own. Comparing an estimated post-injury weekly wage of \$220.00 to a pre-injury weekly wage of \$273.64, there is a twenty percent (20%) loss of wages.

K.S.A. 1992 Supp. 44-510e provides, in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

Although both factors must be considered, the Appeals Board is not required to give them equal weight. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor a greater weight and accordingly they will be weighed equally. The result is an average between the forty-six percent (46%) loss of ability to perform work in the open labor market and the twenty percent (20%) loss of ability to earn a comparable wage resulting in a work disability of thirty-three percent (33%).

(2) The Appeals Board hereby adopts the findings and conclusions of the Administrative Law Judge set forth in the Award that are not inconsistent with the findings and conclusions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Shannon S. Krysl, dated June 30, 1994, should be and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rosella L. Cantrell, and against the respondent, Good Samaritan Village, and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred November 12, 1992, and based upon an average weekly wage of \$273.64, for 18.5 weeks of temporary total disability compensation at the rate of \$182.44 or \$3,375.14, followed by 396.5 weeks at the rate of \$60.21 or \$23,873.27 for a thirty-three percent (33%) permanent partial general body impairment of function, making a total award of \$27,248.41.

As of December 16, 1994, there is due and owing claimant 18.5 weeks of temporary total disability compensation at the rate of \$182.44 or \$3,375.14, followed by 90.79 weeks of permanent partial disability compensation at the rate of \$60.21 per week in the sum of \$5,466.47, for a total of \$8,841.61 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$18,406.80 is to be paid for 305.71 weeks at the rate of \$60.21 per week, until fully paid or further order of the Director.

The remaining orders of the Administrative Law Judge are adopted and incorporated herein, by reference, as if fully set forth herein.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Townsley, Attorney at Law, Wichita, KS 67201-0997
Robert R. Lee, Attorney at Law, Wichita, KS 67206
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director